SUPREME COURT, U. S.

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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-312

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

SANDRA J. DREW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SANDRA J. DREW,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, LIBERTY MUTUAL INSURANCE COMPANY, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 4, 1973 (A1), Petition for Rehearing denied July 12, 1973 (A2).

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, No. 72-3003 (Appendix A3-A15, hereinafter referred to as the "decision") is reported at 5 EPD ¶ 8652, ___F.2d___. The Order and Judgment of the United States District Court for the Northern District of Georgia, Atlanta Division (Appendix A16-A22), is reported at 5 EPD ¶ 8561.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), this Petition for Writ of Certiorari having been filed, in accordance with 28 U.S.C. Section 2101 (c), within 90 days of the entry of the judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

The issue raised by the proceeding below is whether the District Court has jurisdiction under Title VII of the Civil Rights Act of 1964[1], as amended by the Equal Opportunity Act of 1972[2], to entertain a suit solely for preliminary injunctive relief *brought by an individual charging party* pending proceedings before the Equal Employment Opportunity Commission (hereinafter referred to as the "Commission") on the individual's charge which had been filed with the Commission only ten days prior to the filing of the instant law suit.

STATUTES INVOLVED

The relevant provisions of the 1972 Amendments, which require construction in this proceeding, read, in part, as follows:

Section 706 (f)(1):

> "If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under Subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any re-

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[1]42 USC 2000 (e) *et seq.*, hereinafter referred to as "Title VII".

[2]P.L. 92-261, 86 Stat. 103 *et seq.*, March 24, 1972, hereinafter referred to as the "1972 Amendments".

spondent . . . If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . ."

Section 706(f)(2):

"Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited."

STATEMENT OF THE CASE

I. This Case is a companion case to Liberty Mutual v. Equal Employment Opportunity Commission in which a Petition for Writ of Certiorari is pending.

In this matter of first impression, the Court of Appeals has decided that the District Court has jurisdiction to entertain a suit brought by an individual charging party, solely request-

ing preliminary injunctive relief, concurrently with recently instituted and pending proceedings on the individual's charge before the Commission and concurrently, for part of the time, with a suit for almost identical relief which had been filed by the Commission. This case is the companion to the case of *Liberty Mutual Insurance Company* v. *Equal Employment Opportunity Commission*[3], an action brought by the Commission under authority of the 1972 Amendments, in which complete preliminary relief, ordering reinstatement and full backpay to the respondent here, was granted by the District Court, and affirmed by the Fifth Circuit, absent any prior agency or judicial determination that the Act has been violated.

II. The Facts Underlying the Complaint.

Sandra Drew was discharged on April 7, 1972 by petitioner for harassing management and instigating employee discontent; she had been disciplined for her caustically critical public remarks to supervisors and co-employees concerning the wage scale, a proposed cost of living increase and work assignments of the petitioner in its Atlanta, Georgia office.

Unknown to the petitioner, Mrs. Drew had filed a charge on April 6, 1972 alleging sexual discrimination with the EEOC the day before her discharge, which she thereafter amended on April 10, 1972 to include the fact of her discharge.

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[3]A Petition for Writ of Certiorari (to review the decision reported at 475 F. 2d 579) in this companion case was docketed on June 26, 1973 as Number 73-12 and seeks review of that decision of the Fifth Circuit. The proceedings in said matter are hereinafter referred to as the "Commission Case."

Mrs. Drew filed her Complaint in the District Court on April 20, 1972 alleging that she was discharged by the petitioner in violation of the Act in that, allegedly, she was discharged because she filed a charge with the EEOC and because she opposed employment practices made unlawful by Title VII. The Complaint prayed, *inter alia*, that the District Court: (1) order the Commission to commence an investigation of plaintiff's April 10, 1972 charge immediately and (2) order petitioner to reinstate Mrs. Drew with full backpay to her former position pending investigation and disposition of the matter of the rents.

In response, petitioner moved to dismiss the action on the grounds that the complaint did not state a cause of action since, *inter alia*, the appropriate jurisdictional prerequisites had not been alleged and the Commission, from whom a part of the requested relief would have been required, was an indispensable party. The Commission was never joined but, on May 12, 1973, filed its separate lawsuit (the Commission Case) seeking the temporary relief of reinstatement and full backpay. To meet petitioner's jurisdictional challenge, Mrs. Drew on May 23, subsequent to the filing of the Commission's lawsuit, amended her complaint to allege the receipt of a "Notice of Right to Sue" thirty-seven days after filing her charge.

III. The Decisions Below.

On May 30 and 31, 1972, the Court heard evidence in the Commission Case for preliminary injunctive relief and, as a matter of convenience, permitted Mrs. Drew's attorney to participate in a supplementary role since the court's jurisdiction over her independent suit had not yet been formally resolved. Immediately following the conclusion of the testimony on May 31, the Court entered an order in the Commis-

sion Case which directed that Mrs. Drew be reinstated forthwith with full backpay thus granting the Commission all of the relief sought independently by Mrs. Drew excepting her request for attorney's fees.

Thereafter, by order of July 13, 1972 (A16-A22), the lower court dismissed Mrs. Drew's complaint, as amended. First, the court refused to accept jurisdiction over a private individual's attempt to secure temporary injunctive relief in advance of the 180 day waiting period mandated by Title VII. Then, addressing itself to Drew's assertion that the court exercise its purported "inherent equitable jurisdiction", the court stated:

> "Assuming without deciding, that in an appropriate case the court could take jurisdiction in order to grant interim relief pending the EEOC's conciliation or other action, this is not such a case".

The court reasoned that since the Commission had acted promptly (having conducted a prompt investigation prior to the institution of this instant suit by Mrs. Drew and having filed suit on May 12, 1972, while Mrs. Drew then was only initiating discovery), and had obtained a preliminary injunction for the benefit of Mrs. Drew (in the Commission Case), the jurisdictional fact, the Commission inaction necessary to invoke jurisdiction under Mrs. Drew's equitable theory, did not exist. Moreover, the district court noted that the private action was now "superfluous,"—that is, in effect, moot.

The Court of Appeals, however, despite its recognition that Mrs. Drew has already obtained complete relief in the Commission Case, reversed the judgment of the District Court on the basis that the District Court had, and should have asserted, jurisdiction of the individual cause presented; the Court of Appeals has ordered that the matter be remanded

for the purpose of awarding Mrs. Drew attorney's fees and costs. This Petition seeks a review of this order of the Fifth Circuit which, we submit, is appropriate for consideration together with a review of the Commission Case.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

I. The unsettled question as to whether an individual charging party has the right to seek preliminary judicial relief pending proceedings before the Commission.

Under the substantially altered enforcement scheme established by the 1972 Amendments, Congress has entrusted the Commission with the new authority to institute actions in the federal district courts to redress instances of unlawful employment discrimination following unsuccessful conciliation efforts (Sec. 706(f)(1)). The Commission, alone, is also empowered by the 1972 Amendments, in extraordinary cases, to seek temporary injunctive judicial relief pending the processing and final disposition of a charge by the Commission (Sec. 706(f)(2)).

Consistent with the Commission's enhanced new prosecutional role, private suits, although not entirely eliminated, are nonetheless severely circumscribed. Under Section 706(f)(1) of Title VII, one of the 1972 Amendments, Congress, while still permitting private suits to be instituted, expressly requires as a prerequisite thereto: (1) that the charge has been "dismissed by the Commission"; (2) or that "one hundred and eighty days" have elapsed "from the filing of such charge" and "the Commission has not filed a

civil action" or "entered into a conciliation agreement to which the party aggrieved is a party. . . ." There is no statutory provision whatsoever for any proceeding by a private party seeking temporary injunctive judicial relief.

The clear Congressional intent of the new statutory procedure is to allow the Commission sufficient opportunity to weed out meritless causes and to seek voluntary compliance in valid causes before a resort to the Courts (see pp. 10-11, *infra*.). The amended scheme of Title VII is to empower the Commission to seek out and thereafter to eliminate unlawful employment practices initially utilizing the informal methods of conference, conciliation and persuasion and failing such action by bringing a suit in the name of the Commission. In order to assure that the Commission will control the proceeding and thereby have adequate opportunity to achieve the successful resolution of a pending charge, the law provides that a charging party may not bring suit for the adjudication of rights under Title VII until expiration of the prescribed period of time allowing a reasonable opportunity for Commission activity.

Indeed, the decision below recognizes the Court's lack of jurisdiction to adjudicate the controversy on its full merits prior to expiration of the time of required agency deferral.[4] Yet the decision proceeds to hold that preliminary relief should be available to an individual without any such deferral to the Commission. This complete by-pass of agency action improperly subordinates the role of the Commission in the initial processing of a cause under Title VII in clear violation of the statutory scheme. The rationale of the decision appears to be a fear of the Court that irreparable damage may

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[4]Footnote 5 of the decision (A10) states: "She normally would not be permitted to file a suit on the merits unless the Commission had been unable for a period of 180 days to effect conciliation."

not otherwise be avoided. But the 1972 Amendment to the statute has provided a means of providing relief from any such occurrence: Title VII now empowers the Commission to seek and obtain temporary judicial relief where necessary to carry out the purposes of the Act.[5]

The decision does not take direct issue with the Petitioner's contention that it is incompatible to the general scheme of Title VII to allow for such premature private suits but instead concludes that the 1972 Amendments to Title VII did not forbid any such private action for preliminary relief which might have existed prior to the enactment of the 1972 Amendments. Finding no authority whatsoever for the prior existence of such jurisdiction under Title VII or any cases decided thereunder,[6] even before the 1972 Amendments, the Court analogized the instant case to suits brought to enforce rights under other laws which Mrs. Drew had not asserted.

Thus, the decision has created a new and unprecedented jurisdiction permitting a private action for preliminary relief in a Title VII case prior to the expiration of any period of deferral to the Commission. It is submitted that this extraordinary grant of jurisdiction to the Courts created by the decision, which ignores the plain statutory language of Title VII and radically reconstitutes the carefully structured enforcement scheme, is a matter properly to be determined by this Court.

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[5]Indeed, this preliminary judicial relief was sought and obtained by the Commission in the Commission Case within weeks of the filing of the instant action (see pp. 5-6, *infra.*).

[6]To the contrary, the prior decisions of the Fifth Circuit have implied that all private litigation had to await failure of the conciliation process or expiration of the statutory timetable. See *Pettway* v. *American Cast Iron Company*, 411 F. 2d 998, 1005 (1969) and *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28, 32 (1968).

II. The unsettled question as to whether there is a mandatory one-hundred eighty day period of deferral to the commission before any private action may be instituted.

The instant lawsuit was instituted by Mrs. Drew ten days after filing her charge of an alleged illegal discharge with the Commission. At Mrs. Drew's request after she had filed the instant suit, the Commission issued a "Notice of Right to Sue Within 90 Days" on May 18, 1972 but the Commission nevertheless continued to proceed with its lawsuit which had been filed on May 12, 1972.

It is apparent that Mrs. Drew did not allow any reasonable time for Commission action and the decision below completely disregarded any statutory deferral period on the basis that such a deferral period does not apply to an action "to seek such temporary relief pending the action of the Commission".[7] The question thus raised is whether the 180 day period of required deferral to the Commission specified in Section 706(f)(1) is mandatory or may be dispensed with either by the Commission, by issuing its notice of right to sue, or by the Court, in the instance of a suit seeking only temporary relief.

It is submitted that the decision, in holding that the newly enacted 180 day waiting period is not a prerequisite to the institution of suits for temporary relief, directly contravenes expressed legislative intent. A comparison of the former Section 706(f) (1) provision and the current language (supra. pp. 2-3) manifests that, over the objection of some legislators,[8] the Commission's new right to sue was intended to supplant the former right to file a private action "after thirty days".

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[7]Footnote 5 of the decision (A10).

[8]See, e.g., comments of Rep. O'Hare, 117 Cong. Rec. H8521 (Sept. 16, 1971, daily ed.).

Although Congress decided not to eliminate private actions completely, Congress did impose a jurisdictional 180 day insulated period during which the threat of the Commission's new power could be brought to bear upon a respondent "to eliminate an alleged unlawful employment practice by informal methods"[9] without interference by private lawsuits, and, if such efforts failed, to institute court proceedings.[10] A cumulative reading of the statutory provisions plainly indicates that private relief was contemplated only as a last resort; such private actions are authorized only where the Commission is unwilling to sue on the aggrieved party's behalf (and dismisses the charge) or where, because of its administrative backlog, the Commission is unable to institute such proceeding with reasonable dispatch, a period which Congress fixed as 180 days from the filing of the charge.

In order to circumvent the clearly defined statutory 180 day waiting period, the decision equates the plaintiff's cause of action with that brought in *Sanders* v. *Dobbs House, Inc.*,

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[9]Conference Report, Section by Section Analysis, 118 Cong. Rec. H1862 (Mar. 8, 1972, daily ed.).

[10]This provision, adopted after substantial debate, was the product of a reasoned compromise between competing legislative forces. An attempt was made to terminate this 180 day period once an effort to require the Commission to bring suit after 30 days was defeated "in the interest of [affording the Commission] flexibility in working something out through voluntary compliance". 118 Cong. Rec. S469 (Jan. 25, 1972, daily ed.). This proposal was rejected, however and by unanimous resolution the 180 day waiting period was retained. 118 Cong. Rec. S470 (Jan. 25, 1972, daily ed.). Recently in a parallel situation within the sphere of judicial discretion, the Fifth Circuit properly limited the individual right to sue under the Act in order to harmonize conflicting federal policies. *Rios* v. *Reynolds Metals Co.* 2681 467 F. 2d 54 (5th Cir. 1972).

431 F. 2d 1097 (5th Cir. 1970). The Court has held that like the 1866 Civil Rights Act (22 U.S.C. Section 1981, hereinafter referred to as "Section 1981") applicable in *Dobbs*, Title VII has declared a right and therefore, like the decision in *Dobbs*, the Court decided it has jurisdiction to fashion a remedy. The significant difference between *Dobbs* and the instant case, however, is the distinction between Title VII and Section 1981. Section 1981 is a statute which, unlike Title VII, does not contain any comprehensive scheme for enforcement of rights, indeed which provide no remedy whatsoever for alleged violations, but rather merely states a broad declaration that such rights exist. Absent the statutory scheme of enforcement, the Court in *Dobbs* properly fashioned an appropriate remedy necessary for the preservation of the right. Conversely, however, Title VII sets forth in detail that the rights declared under the Civil Rights Act of 1964 are to be enforced through the processes of the Commission with an absolute requirement that suits by private parties for any complete adjudication of claimed rights be deferred until the Commission has had at least 180 days, that period of time which Congress has declared to be a reasonable opportunity to conciliate any controversy. The Fifth Circuit's logic of predicating its conclusion by analogizing decisions under Section 1981 fails because the rights of plaintiff do not arise under this earlier law. The entire claim of plaintiff has been created under Title VII: plaintiff alleges that she was discharged either for filing a charge with the Commission created by Title VII, or for protesting acts made unlawful under Title VII. The plaintiff's charges are particularly and specifically related to Title VII and would not come within the purview of Section 1981. Plaintiff has fully admitted this distinction in abandoning the allegations of any claim under Section 1981, a circumstance that the decision recognizes. (A5) Yet, the reasoning of the decision is

fully predicated upon rights that the Court assumes existed by analogy to Section 1981, and which the Court then assumes were not lost by enactment of the 1972 Amendments to Title VII. The illogical aspect of the decision is pointed out by the question it raises: how can the Court allow a suit for relief predicated upon one statute, which is not the basis for the claim, where the rights alleged arise under a different statute, which does not provide for the relief granted?

The judicial disregard of the legislatively imposed 180 day waiting period as a precondition to any private litigation is a matter appropriate for determination by this Court and recommends the issuance of a Writ of Certiorari.

III. The unsettled question as to the circumstances which render appropriate a suit for, or an award of, temporary relief.

Although the specific contention of this petition is that Title VII precludes jurisdiction for a private suit for preliminary injunction relief pending proceeding before the Commission, this case does also contain the identical issue raised in the Petition for Writ of Certiorari filed in the Commission Case:

Under what circumstances should preliminary relief be granted in an employment discharge case alleging a violation of Title VII (assuming, arguendo, that the Court does have jurisdiction)?

The decision concludes that the facts of this case bring it within "the limited class of cases" in which "the individual employee may bring her own suit to maintain the status quo" (A8). Yet, there is nothing in the facts of this case to distinguish it from the run-of-the-mill Title VII case. The decision fails to delineate any limitations to the so-called "limited class"; it is reasonably clear that the ordinary em-

ployment discharge case alleging discrimination pending before the Commission will readily meet the generic test. There is neither indication nor implication that preliminary relief may be denied in any instance where there is even a mere scintilla of evidence to support an allegation of a discriminatory discharge. Thus, the decision forbodes suits for preliminary relief by private individuals in virtually all Title VII discharge cases irrespective of any conclusion by the Commission that such relief is necessary to serve the interests of Title VII as that statute requires as a condition precedent to seeking such temporary relief.

Certainly the Court below could not have deemed Mrs. Drew's private suit justified on the basis of any administrative delay. The Commission had already commenced its investigation of the charge at the time this suit was filed. Such a "preliminary investigation" by the Commission in advance of filing any suit for temporary injunctive relief is required under Title VII (Section 706(f) (2)). To deny the Commission the right to conduct its investigation, at the risk of either being preempted by a private suit or accused of dilatory action, conflicts directly with Congress' intent that the Commission initially screen out the vast majority of cases where utilization of the extraordinary temporary injunctive provisions may not be warranted. Promptly following such investigation in this case, the Commission filed its suit for, and expeditiously obtained, temporary injunctive relief, the suit being instituted about one month after Mrs. Drew's charge had been filed with the Commission; thus, the proceedings patently were not an example of "inherently slow agency process" as Mrs. Drew alleged.

For all of the foregoing reasons, it is submitted that the District Court was correct, contrary to the decision of the Fifth Circuit, to the extent it held that even if jurisdiction

for a private suit for temporary relief can exist in an appropriate case, this was not such a case. The decision of the Fifth Circuit fails to delineate any standards as would indicate the circumstances when it would be appropriate to grant preliminary relief in a private suit and the need for the establishment of such standards by this Court recommends the issuance of a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-3003

D. C. Docket No. CA 16496

SANDRA J. DREW,
Plaintiff-Appellant,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by Counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

June 4, 1973

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3003

SANDRA J. DREW,
Plaintiff-Appellant,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 4, 1973 ——, 5 Cir., 1973 —— F.2d ——).

(July 12, 1973)

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3003

SANDRA J. DREW,
Plaintiff-Appellant,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(June 4, 1973)

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal by Sandra Drew, a white female[1] employee of Liberty Mutual Insurance Company seeking a preliminary injunction to prevent her employer from discharging her for what she alleged to be the filing of a complaint of discrimination on account of sex by her employer.

[1]We make this reference to the color and sex of the individual involved solely because it is essential in order to pinpoint the precise nature of the alleged discrimination which was the subject of this lawsuit.

The complaint which was filed on April 19, 1972, alleged in effect: (a) That Liberty Mutual, Drew's employer discriminated against female employees in the terms and conditions of employment in violation of Title VII of the Civil Rights Act of 1964, (b) That on April 6, 1972, she had filed a charge of discrimination with the Equal Employment Opportunity Commission, outlining Liberty Mutual's violations of Title VII, (c) That on April 7, 1972, the day after the filing of the charge, she had been fired, and (d) That her discharge was in retaliation for having filed her charge with the Commission and for opposing practices prohibited by Title VII. She alleged that this violated subsection 704(a) of Title VII.[2]

Ms. Drew's complaint sought an order temporarily reinstating her to the position she had held, awarding pay for the period she had been unemployed, prohibiting future reprisal. It sought to obtain temporary relief to preserve the status quo pending the Commission's administrative disposition of her charges.

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[2]This section provides as follows:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title."

On May 2, Liberty Mutual moved to dismiss the complaint, primarily on the grounds that it failed to state a claim and, secondarily, on grounds that an indispensable party, the Commission, had not been joined. The trial court held a hearing on the motion to dismiss on May 4, and, according to the transcript of the proceedings, expressed a strong doubt as to the right of the individual employee to maintain such an action in light of the amendment to Title VII made effective in 1972, which amendment, for the first time, provided that in exceptional circumstances, following the filing of a complaint, the Commission "may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge."

Nevertheless the court did not dismiss the complaint but allowed the plaintiff's counsel additional time to file an amended complaint. One amendment was filed May 10, 1972, alleging a conspiracy in violation of one of the Civil War Civil Rights Acts, 42 U.S.C. § 1985(3), a ground for relief that has now been abandoned. A further amendment was filed May 23, 1972, which alleged that the Commission had, at Drew's request, issued a "Notice of Right to Sue Within 90 Days" on May 18, 1972.

In the meantime, on May 12, 1972, the Commission filed a complaint of its own alleging substantially the same fact as contained in the Drew complaint. It also sought the same injunctive relief. It must be noted that this was not a suit for final relief as provided for under Section 706(f)(1) of the Act. It was filed under the emergency provisions of Section 706(f)(2) seeking temporary relief pending the Commission's action on the original charge.

On May 30-31, 1972, a hearing was held, as stated by the trial court, on the suit filed by the Commission, although Drew's counsel was permitted to participate.

At this hearing the trial court found sufficient evidence to conclude that the Drew discharge had been retaliatory, in violation of subsection 704(a) and to warrant the granting of injunctive relief. In doing so, the court specifically found that the plaintiff had suffered irreparable harm. The court ordered Liberty Mutual to reinstate Ms. Drew at her former position with back pay. This judgment has recently been affirmed by this court. *Equal Employment Opportunity Commission v. Liberty Mutual Insurance Co.*, No. 72-2834, decided March 27, 1973, ____ F.2d ____.

Subsequently, the trial court dismissed the Drew complaint and awarded costs to the defendant. In its order the court held that Title VII did not confer jurisdiction to a private party to maintain a suit for injunctive relief, or any other relief, prior to the expiration of 180 days from submission of a charge to the Commission. In addition the court held that it lacked jurisdiction under its equitable powers because "the equity powers which the plaintiff and the EEOC assert that the court should exercise must be employed, if at all, only when there is no statutory basis for granting relief and when the relief sought cannot be obtained through any other forum or procedure." The court concluded that since the Commission had filed suit it was not necessary for Ms. Drew to invoke the extraordinary equity powers of the court in order to obtain the relief sought. The court held, therefore, that her action was "superfluous." It therefore dismissed the case "for lack of subject matter jurisdiction."

The court then made the following statement

> "However it is the opinion of the court that the plaintiff should be allowed to intervene in the case of EEOC v. Liberty Mutual Life Insurance Co., Civil Action No. 16590. *Up to the present time, plaintiff's interests have been adequately preserved by the existence of her individual action,* now dismissed by virtue of this order.

In the future her interests can best be protected by intervention. Accordingly, *she is directed to make application for intervention pursuant to Rule 24, Fed. R. Civ. P.*" (Emphasis added).

This wound up the matter below, except that costs were granted to the defendant and no attorney's fees for the plaintiff's counsel were allowed.

As we have pointed out, Ms. Drew has, under an order of the court, been reinstated to her position, pending further proceedings before the Commission. On the basis of this fact, the defendant contends that the case before us is now moot. We think the case is not moot, because the plaintiff below has been cast for court costs and, in spite of what the record in the trial court shows to have been a very substantial amount of effort expended on behalf of their individual client, who ultimately prevailed, at least by their joint efforts with counsel for the EEOC, the trial court did not even consider the propriety of awarding counsel fees as is authorized under the statute.

We are satisfied that if we should conclude that the Drew complaint, at the time it was filed, and for a period of time during which counsel performed substantial service for her, was properly in the district court, it would be our duty to remand to the trial court either for reinstatement of the suit, or for relieving the plaintiff of her obligation to pay for the costs of the action. The trial court would then also consider the award of attorney's fees for service performed for Ms. Drew.

The basic question decided by the trial court, and which we now hold is still a viable issue, is whether, when Congress enacted the 1972 amendments to the statute which for the first time gave the EEOC the right to file suit both for the enforcement of the rights of the employee and also to seek

temporary relief in a hardship case, it made such provision the exclusive means by which a person in Ms. Drew's position could be protected from irreparable damage to herself.

We conclude that in the limited class of cases, such as the present, in which irreparable injury is shown and likelihood of ultimate success has been established, (here this has been determined by the trial court), the individual employee may bring her own suit to maintain the status quo pending the action of the Commission on the basic charge of discrimination.

Our reasoning derives from the fact that, prior to the 1972 amendment, it is clear that a victim of such forbidden conduct as was here alleged had a clear right to seek equitable relief without having to await the convenience of the EEOC. The 1964 Act gave no power to the EEOC to bring such an action. However, the right to be free from such discriminatory conduct was expressly spelled out in the Act.[3] Thus, the court would have jurisdiction to fashion an equitable remedy to vindicate the right. See e.g., *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir., 1970).

The situation in which Ms. Drew found herself would have been equated to that of Ms. Sanders in the *Dobbs* case. Ms.

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[3]42 U.S.C.A. § 2000e-2 (a):

> "It shall be an unlawful employment practice for an employer:
>
> . . . to discriminate against any individual . . . because he opposed any practice made an unlawful practice by this title, or because he made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title."

Sanders sued under 22 U.S.C.A. § 1981,[4] one of the 1866 Civil Rights Acts. This Act, as will be seen, did not prescribe any remedy. It merely created a right in every person to make and enforce contracts "as is enjoyed by white citizens." Yet in *Dobbs* we sustained the right of Ms. Sanders to bring an action in equity in the district court. In doing so, we relied upon the Supreme Court decision in *Jones v. Alfred Mayer Co.*, 392 U.S. 409. The Supreme Court said:

> "The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a Federal Court from fashioning an effective equitable remedy. See, e.g. Texas and N.O.R. Co. v. Railway Clerks, 281 U.S. 548, 568-570; Deckert v. Independence Corporation, 311 U.S. 282, 288; United States v. Republic Steel Corp., 362 U.S. 482, 491-492; J. I. Case Co. v. Borac, 377 U.S. 426, 432-435. Cf. ex parte Young, 209 U.S. 123; Griffin v. School Board, 377 U.S. 218."

We have no doubt, therefore, that, prior to the amendment of 1972, Ms. Drew could have filed the suit for an injunction pending the consideration to be given to her charges by the EEOC.

Moreover, it must be remembered that what, and all, the plaintiff sought here was temporary relief to prevent irrep-

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[4]Section 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

arable injury while the Commission carried on its function of negotiating and conciliating.[5]

As one commentator said concerning such an action prior to the amendment:

> ". . . It would seem that if the court has power to grant a preliminary injunction when the final decision-making authority is in an administrative body, a fortiori it should have the power to award such relief when it must only defer to the agency for a period of attempted conciliation and the final decisional authority rests with the court. Indeed, such an injunction might be essential to preserve the court's ability to later order meaningful relief." Note, Developments In The Law — Employment Discrimination in Title VII of the Civil Rights Act of 1964, 84 Harvard Law Review, 1109, 1257 (1971).

The case of *Gomez v. Florida State Employment Service*, 417 F.2d 569, 5th Cir., 1969, is also instructive in its holding that a right of action can be fashioned by a federal court when the beneficiary of a federal law contends he is deprived of its benefits.

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[5]It must be remembered that this is not an action brought by Mrs. Drew for a final adjudication of her right to be protected against the alleged discriminatory conduct of the defendant. That matter is being considered by the Commission in the usual course. She normally would not be permitted to file a suit on the merits unless the Commission had been unable for a period of 180 days to effect conciliation. The 180-day provision, of course, does not apply here, because the action brought by Mrs. Drew is merely one to seek temporary relief *pending the action of the Commission.* It is similar to the action which the Commission now has the right to bring under Section 706(f)(2).

The trial court, however, without specifically considering the question whether Ms. Drew might have had a right to bring such an action prior to the adoption of the amendment, concluded that the adoption of the amendment by Congress (by which, for the first time, the EEOC was given the right to file an enforcement proceeding in the court and also to "bring an action for appropriate temporary or preliminary relief pending final disposition of such charge" when the Commisssion concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the Act) made such provision the exclusive remedy available for the protection of an employee like Ms. Drew.

We find no basis for such a construction of the 1972 Act. The original Senate version of the proposed amendment to the Act and House version differed materially. At all stages in the proceedings strong minority reports attacked the authority finally given for the Commission to file enforcement proceedings in court and to take the action which we have just described pending a final decision by the EEOC. The House bill as passed provided that charges under Title VII are the exclusive remedy for unlawful employment practices. In Conference, the House receded. U. S. Code Congressional and administrative News 1972, p. 2181. This would be a strong indication of the intent of Congress *not* to exclude court action of the kind previously available.

Included in the legislative history is the unanimous comment of majority and minority committee reports to the effect that the Commission is simply overwhelmed with complaints. In the House Minority Committee report is a quotation of Chairman Brown that EEOC's backlog "now means an average delay of 15 months to 2 years before the Commission can complete action on a complaint." U. S. Code Congressional and Administrative News 1972, p. 2170.

Under the theory advanced by Liberty Mutual, and adopted by the trial court, Ms. Drew would have to be fortunate enough for her complaint with EEOC so to divert the attention of the staff from its overwhelming burden of cases to distinguish it as one which demanded immediate attention, resulting in the preparation and filing of a suit by staff attorneys pending the usual course of processing the complaint before she would ever be able to act on her own to seek an end to the irreparable damage she was suffering. If she had not been fortunate enough to obtain counsel willing to file the complaint for her one can only speculate as to the likelihood that the EEOC would have considered her case as having the merit which the trial court found it to contain. We should not lightly assume that Congress sought to do away with the chance that private litigants might in this manner alleviate the burden on EEOC members and staff in the rare situation when the likelihood of success and the need for immediate assistance could attract competent counsel to act.

We think that none of the criteria by which courts generally consider that an act of Congress, silent on the subject, is held to have impliedly destroyed an existing right of action are present here. In the Dobbs case it was argued that the enactment of Title VII of the Civil Rights Act of 1964 preempted the general remedial language of 42 U.S.C.A. § 1981; that is to say that the enactment of the statute we are concerned with prohibiting discrimination in employment on account of race and sex put an end to the right of a litigant to rely on Section 1981 as a basis for bringing a suit alleging a denial of the opportunity to be employed on account of race. We answered this contention by saying:

> "Since there is no language in Title VII that can remotely be construed as directly repealing Section 1981, the only means of repeal through preemption would be by implication. *Repeals by implication however are not favored.*

'The intention of the legislature must be clear and manifest . . .' " Citing Posada v. National City Bank, 296 U.S. 497, 503.

We also pointed to the case of *Waters v. Wisconsin Steel Works, etc.*, 427 F.2d 476, 7th Cir., 1970, in which it was held that:

"a right to sue under Section 1981 for private racial discrimination in employment existed prior to 1964. By enacting Title VII of the 1964 Civil Rights Act, Congress did not repeal this right to sue." 427 F.2d at 481.

In Dobbs we also stated that:

"This interpretation also finds support by analogy in Jones v. Alfred H. Mayer Co., where the court ruled that Title VIII of the Civil Rights Act of 1968 did not repeal Section 1982 by implication. Moreover, in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237, the court stated:

'We noted in Jones v. Alfred H. Mayer Co. that the Fair Housing Act of 1968, 82 Stat. 81, in no way impaired the sanction of Section 1982. 392 U.S. at 413-417. What we said there is adequate to dispose of the suggestion that the public accomodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. For the hierarchy of administrative machinery provided for the 1964 Act is not at war with the principles embodied in Section 1982.' "

Moreover, it is clearly the policy of the legislation to encourage the use of privately employed counsel as private attorneys-general to aid in the enforcement of this statute. This is made evident by the provision in Section 2000e-5 for the appointment of counsel in the event that the Commission dismisses a charge or if, after 180 days, the Commission has not filed a civil action.

As to the suggestion contained in the written opinion of the trial court that a chaotic situation would result if private litigants in the position in which Ms. Drew found herself upon her summary dismissal because of her having filed a complaint with the EEOC were permitted to seek temporary injunctive relief, we call attention to what this court has previously noted in *H. Kessler & Co. v. EEOC, et al.*, —— F.2d ——, (5th Cir., 1973) decided January 29, 1973. We there said:

> "The courts of this circuit have previously found that competent lawyers are not eager to enter the fray in behalf of a person who is seeking redress under Title VII. This is true even though provision is made for payment of attorney's fees in the event of success. In the case of Petete v. Consolidated Freight Ways, 313 F.Supp. 1271 (D.C. N.D., Tex., 1970), the court found that 'further complicating plaintiff's problem has been the reluctance of the attorneys she has approached to undertake the specific and complex challenges of a Title VII law suit which are not common to more frequently litigated areas of the law.' See also, Edmonds v. E. I. DuPont de Nemours & Co., 315 F.Supp. 523, 524 (D.C. Kansas, 1970); Sanders v. Russell, 401 F.2d 241 (CA 5, 1968)."

We conclude that there is no apparent set of circumstances that would cause us to construe the 1972 amendment as having impliedly destroyed the right of action which Ms. Drew would previously have had prior to its enactment. It was therefore error for the trial court to have concluded that Ms. Drew's case was subject to dismissal for failure to state a claim on which relief could be granted. It is not simple to determine what course of action should be pursued upon a remand to the trial court. As noted above Ms. Drew has been afforded the relief she sought in her law suit, by the filing of a suit a month later by EEOC seeking the same result.

Nevertheless, it is clear that if the Drew case was properly in court it was improper to charge her with the costs of the trial court action and to fail to consider the request for attorney's fees. Significantly, the trial court recognized the value of the work performed by Ms. Drew's counsel when it made the comment:

> "To the present time [July 12] plaintiff's interests have been adequately preserved by the existence of her individual action."

Furthermore, the court seemed to consider it necessary for her to be a party to the continuing action, because it further stated:

> "She is directed to make application for intervention pursuant to Rule 24 Fed. R. Civ. P."

It appears from the trial court records that Ms. Drew has now intervened in the EEOC suit. This being the case, we conclude that this is an adequate disposition of her interests and that on remand the court consider the awarding of counsel fees to Ms. Drew to represent the value of the services performed on her behalf by counsel up until the time when the intervention was accomplished, and including services performed by them in connection with this appeal.

The judgment is REVERSED and the case is REMANDED to the trial court for further proceedings not inconsistent with this opinion. The order of the trial court dismissing Ms. Drew's complaint is vacated pending a further order of the court dealing with the matter of counsel fees. Following the entry of such order, the suit can be dismissed with costs awarded to the plaintiff.

United States District Court

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

SANDRA DREW

vs.

LIBERTY MUTUAL INSURANCE COMPANY

CIVIL ACTION NO. 16496

ORDER

(Filed July 13, 1972)

This action seeks temporary injunctive relief for an individual plaintiff who was allegedly discharged from her employment in violation of Title VII of the Civil Rights Act of 1964. The action was filed on April 20, 1972, after plaintiff had filed two charges with the Equal Employment Opportunity Commission (hereinafter EEOC) but before any action had been taken by the EEOC. On May 12, 1972, an action against the defendant was filed by the EEOC seeking temporary injunctive relief pending final disposition by the EEOC of the complaints of employment discrimination which had been filed against defendant by Sandra Drew and Cheryl Goldberg.

On May 30 and 31, 1972, the court held an evidentiary hearing on the motions for preliminary injunction in these two companion cases. At the close of the hearing, the court ordered the defendant to reinstate plaintiff Drew in her former position and further ordered that she receive back pay from the date of discharge. A written order to that

effect is issued this date in the case of EEOC v. Liberty Mutual Life Insurance Company, Civil Action No. 16590.

The instant action is before the court on defendant's motion to dismiss the complaint as amended. The question here presented is whether an individual has the right to come into federal district court seeking temporary injunctive relief pending disposition by the EEOC of a charge of employment discrimination. Plaintiff and the EEOC, arguing in support of plaintiff's right to maintain the independent action, have set forth four possible grounds upon which the court might allow plaintiff to assert her claim for preliminary injunctive relief, as follows: (1) a statutory right to proceed under § 706(f)(2) of the Equal Opportunity Act of 1972 [42 U.S.C. § 2000e-5(f)(2)]; (2) a right of action under 42 U.S.C. § 1985(3), the civil rights conspiracy statute; (3) a "right to sue letter" which was sent by the EEOC to the plaintiff on May 18, 1972; and (d) the traditional equity power of this court, by which it can grant preliminary injunctive relief pending determination by an administrative agency. For the reasons set forth below, the court finds that none of these four grounds is sufficient to confer jurisdiction upon the court.

In its order of May 30, 1972, and in discussions in open court, the court has already set forth its conviction that § 706(f)(2) of the Equal Employment Act of 1972 provides only that the EEOC may seek preliminary relief in federal district court. That statute makes no mention of a private individual's right to seek injunctive relief from the court pending disposition by the EEOC. Accordingly, plaintiff has no right to proceed under this statute.

The question of plaintiff's right to proceed under 42 U.S.C. § 1985(3) was dealt with in the court's order of May

30, 1972, which dismissed for failure to state a claim the portions of the complaint which sought to state a claim under § 1985(3).

On May 30, 1972, plaintiff was allowed to amend her complaint by adding a claim of right to relief by virtue of a "right to sue letter" which was sent by the EEOC to plaintiff on May 18, 1972. Plaintiff now claims that any jurisdictional defect was cured by the receipt of the "right to sue letter" and the amendment of the complaint to reflect receipt of that letter. Defendant has moved to dismiss this portion of the complaint as well.

The Equal Employment Act of 1972 provides that:

> . . . . If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such change or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice . . . . 42 U.S.C. § 706(f)(1).

The amended § 706 makes no mention of the right which a complainant had under Title VII prior to the 1972 amend-

ment, to a "right to sue letter" thirty days after the filing of a charge with the EEOC. 42 U.S.C. § 706(c), now amended. The new law completely supplants the earlier scheme; the reasoning of Congress was to extend the time period during which the EEOC seeks to effectuate conciliation.

The "right to sue letter" which was issued to plaintiff Drew by the EEOC was mailed only forty-two days after the filing of plaintiff's first charge with the EEOC. While the letter purports to enable plaintiff to bring suit in federal court, the letter has effect only insofar as it is issued in compliance with the terms of the statute. While prior to the 1972 Act a "right to sue letter" could issue thirty days after the filing of the charge with the EEOC, the new amendment makes clear that such a letter can be issued only after one hundred eighty days. Accordingly, the so-called "right to sue letter" issued to plaintiff before the expiration of the statutory period was erroneously issued and has no legal effect. Jurisdiction of this court cannot then be founded on the "right to sue letter" of May 18, 1972.

The final jurisdictional basis urged by the plaintiff and by the EEOC is that the court, as an exercise of its traditional equity power, has the power and the jurisdiction to grant preliminary injunctive relief pending final disposition by the EEOC of the charge of discriminatory employment practices. Relying in particular on *Murray* v. *Kunzig*, ——F.2d—— (D.C. Cir. Feb. 29, 1972), the EEOC argues that absent a clear statutory provision negating such jurisdiction, the court has jurisdiction to maintain the *status quo* and thus render *more meaningful* the administrative proceedings. The EEOC has cited no case, however, where the court has assumed jurisdiction for purposes of granting

preliminary injunctive relief in a Title VII situation. The question is thus a novel one and must require for its resolution a careful consideration of the statute here involved in order to determine to what extent that statute as amended defines the exclusive procedures in employment discrimination cases.

However, in the instant case the court need not decide that issue. Assuming, without deciding, that in an appropriate case the court could take jurisdiction in order to grant interim relief pending EEOC's conciliation or other action, this is not such a case. The equity powers which the plaintiff and the EEOC assert that the court *should exercise must be employed, if at all, only when there is no statutory basis for granting relief and when the relief sought cannot be obtained through any other forum or procedure.* In the instant case the EEOC has taken advantage of the power newly conferred upon it by the 1972 ACT to come into federal court seeking preliminary injunctive relief on behalf of a complainant pending disposition of her charge before the EEOC. The EEOC has sought and obtained a preliminary injunction for the benefit of Sandra Drew. Thus in the instant case of Sandra Drew, in order to obtain the relief sought, need not invoke the extraordinary equity powers of this court. Plaintiff Drew's interests have been maintained, on the question of a preliminary injunction, by the EEOC's exercise of its statutory authority. Her private action seeking identical relief through the extraordinary and inherent equity power of the court is superfluous and is hereby DISMISSED for lack of subject matter jurisdiction.

However, it is the opinion of the court that the plaintiff should be allowed to intervene in the case of *EEOC* v. *Liberty Mutual Life Insurance Company,* Civil Action No.

16590. Up to the present time, plaintiff's interests have been adequately preserved by the existence of her individual action, now dismissed by virtue of this order. In the future her interests can best be protected by intervention. Accordingly, she is directed to make application for intervention pursuant to Rule 24, Fed. R. Civ. P.

The court has today DISMISSED plaintiff's action for lack of subject matter jurisdiction and it is ORDERED AND ADJUDGED that the same be, and is hereby DISMISSED. The court has further directed that plaintiff make motion to intervene in Civil Action No. 16590.

IT IS SO ORDERED.

This, the 12th day of July, 1972.

Richard C. Freeman

RICHARD C. FREEMAN
United States District Court

United States District Court

FOR THE

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

SANDRA J. DREW

vs.

LIBERTY MUTUAL INSURANCE COMPANY

JUDGMENT

This action came on for consideration before the Court, Honorable RICHARD C. FREEMAN, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed and that the defendant LIBERTY MUTUAL INSURANCE COMPANY recover of the plaintiff SANDRA J. DREW its costs of action.

Dated at Atlanta, Georgia, this 13th day of July, 1972.

Filed and entered in Clerk's Office July 13, 1972.
BEN H. CANTER, *Clerk*

BY: PEGGY W. MONTGOMERY
Deputy Clerk

BEN H. CANTER
Clerk of Court

BY: PEGGY W. MONTGOMERY
Deputy Clerk